IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT MINNESOTA

John Doe,

Plaintiff,

v.

University of St. Thomas, Minnesota,

Defendant.

Civil Action No. 16-cv-1127 (ADM/KMM)

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO PROCEED PSEUDONYMOUSLY

INTRODUCTION

Plaintiff's motion to proceed pseudonymously in this litigation should be denied. Protecting students' privacy is of the utmost importance to the University of St. Thomas, Minnesota ("University" or "UST"). However, Plaintiff has not met the high burden required to use a pseudonym in a legal proceeding, and his own actions in prior filings weigh against granting his motion. Plaintiff's concerns about protecting the details of the allegations referenced in his Verified Complaint are more appropriately addressed by the entry of a protective order. Because Plaintiff presents no significant or unique arguments weighing in favor of pseudonymous status, his motion should be denied.

PROCEDURAL BACKGROUND

The University incorporates the procedural background set forth in its two substantive memoranda in support of its Emergency Motion to Strike and Seal Exhibits to and Allegations in Plaintiff's Verified Complaint, Motion for a Protective Order, and

Motion for Sanctions. (*See* ECF Nos. 11 and 23.) UST provides the following additional background in response to Plaintiff's Motion to Proceed by Pseudonym.

Plaintiff is a full-time student at the University of St. Thomas. (Compl. ¶¶ 2-3). In his Complaint, Plaintiff alleges claims against the University for: (1) violation of Title IX administrative requirements (Count I); (2) discrimination in violation of Title IX (Counts II-III); (3) breach of contract (Count IV); (4) breach of covenant of good faith and fair dealing (Count V); and (5) negligence (Count VI). Plaintiff's claims are based on UST's determination that Plaintiff violated the University's Sexual Misconduct Policy. (Compl. ¶¶ 166, 191, 193, 201, 204, 209.)

In late April and early May 2016, counsel for the University and counsel for Plaintiff had numerous conversations and exchanged multiple emails about Plaintiff filing this case under pseudonymous status. (2d Supp. Schooler Aff., ¶ 2.) Counsel for the University repeatedly asked counsel for Plaintiff to follow the appropriate procedures regarding proceeding pseudonymously, including that Plaintiff make a motion. (*See Id.* Ex. F (May 4, 2016 Letter from Schooler to McGraw).) Counsel for the University indicated concern that Plaintiff's proceeding by pseudonym, while simultaneously and purposefully exposing Jane Doe's personal identifying and medical information to the public, is an inappropriate litigation strategy. (*Id.* ¶ 4.)

On May 4, 2016, the University's Vice President of Student Affairs, who is identified in the Verified Complaint and the exhibits filed by Plaintiff, received an explicit voice mail threat as a result of the media coverage of this case. (2d Supp. Schooler Aff., ¶ 5.)

ARGUMENT

A. Standard of Review

Rule 10 of the federal rules requires a pleading to contain the names of the parties. Fed. R. Civ. P. 10(a). The use of fictitious names "runs afoul of the public's common law right of access to judicial proceedings." *Does I thru XXIII v. Adv. Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598-99 (1978)). This presumption of publicly identified litigants is vital to the public's "right to know who is using their courts." *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997). Public litigation follows from the maxim that "a party invok[ing] the judicial powers of the United States [] invite[s] public scrutiny." *Luckett v. Beaudet*, 21 F. Supp. 2d 1029, 1029 (D. Minn. 1998) (Rosenbaum, J.).

In light of the foregoing, parties are entitled to proceed by pseudonym only "in exceptional cases." *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (citation omitted). This District recognizes the "strong presumption against allowing parties to use a pseudonym." *Luckett*, 21 F. Supp. 2d at 1029 (citing *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997)); *see also Doe v. Public Citizen*, 749 F.3d 246, 273-74 (4th Cir. 2014) ("Pseudonymous litigation undermines the public's right of access to judicial proceedings."). Courts have an independent obligation to ensure that anonymity is balanced against the public's interest in openness and any prejudice anonymity poses to the opposing party. *Public Citizen*, 749 F.3d at 274.

In determining whether a party may proceed by pseudonym, the Court is guided by three non-exhaustive factors. *Id.* The Court should consider whether: "(1) plaintiffs seeking anonymity were suing to challenge governmental activity; (2) prosecution of the suit compelled plaintiffs to disclose information 'of the utmost intimacy'; and (3) plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution."[1] *Luckett*, 21 F. Supp. 2d at 1029 (citing *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981)).

Here, only one of these factors is relevant, namely, whether the prosecution of this case compels Plaintiff to disclose information "of the utmost intimacy." A review of case law analyzing this factor weighs against Plaintiff proceeding under a pseudonym. Plaintiff cannot meet his high burden of overcoming the presumption against anonymous litigation.

B. Plaintiff Fails to Overcome the Presumption Against Pseudonymous Litigation

Plaintiff offers few justifications to overcome the presumption against using a pseudonym in federal litigation. Plaintiff's primary arguments appear to be: (1) he alleges that he is wrongfully accused and attempting to clear his name; (2) the University's decision, which he is challenging, is based on information that is "highly personal" and would "subject him, and others, to embarrassment"; and (3) the University's decision involves allegations that have a "high likelihood of causing him irreparable harm for the

[1] Plaintiff cites three factors utilized by the Ninth Circuit. The University believes the three factors on which Judge Rosenbaum relied in *Luckett* and numerous other courts are the appropriate factors to consider. *See, e.g.*, *Rose v. Beaumont Indep. Sch. Dist.*, 240 F.R.D. 264, 266 (E.D. Tex. 2007); *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 763 (D. Minn. 2006); *Webb v. Phoebe Putney Mem'l Hosp.*, No. 1:05 CV 124(WLS), 2006 WL 2583365, at *3 (M.D. Ga. Sept. 6, 2006); *Barth v. Kaye*, 178 F.R.D. 371, 376 (N.D.N.Y. 1998) (including two other factors as well); *Roe v. La. Supreme Court*, No. Civ. A. 92-3363, 1993 WL 74945, at *1 (E.D. La. Mar. 5, 1993).

rest of his life." (Pl.'s Br. at 3.) Plaintiff's justifications fall outside of the narrow exceptions to proceeding under his own name.[2]

Under *Luckett*, the second factor requires the Court to consider whether the litigation concerns matters of the "utmost intimacy" sufficient to allow a party to proceed anonymously. *Doe v. Temple University* is instructive. In *Temple*, a male student brought suit against his university after he was expelled following a finding of sexual misconduct. *Temple Univ.*, Civ. No. 14-04729, 2014 WL 4375613, at *1 (E.D. Pa. Sept. 3, 2014). The male student sought to proceed anonymously. *Id.* After reciting various factors to consider, the court made a number of findings. The court recognized that sexual assaults on campus are important issues commanding national attention, and that the male student **chose** to file a federal lawsuit. *Id.* at *2. The court went on to find that general allegations of "embarrassment" and "further damage to his personal and professional reputation"—the same bases Plaintiff offers in this case—were insufficient to overcome the presumption against pseudonymous litigation. *Id.* The Court recognized that "[t]here are many examples of plaintiffs proceeding with suits in their own names protesting sexual assault discipline from universities. *Id.* at *2 (citing *Johnson v. Temple Univ. of Commonwealth Sys. Of Higher Educ.,*Civ. A. 12–515, 2013 WL 5298484 (E.D. Pa.

[2] Two of the three factors identified in *Luckett* are neither relevant to nor put forward by Plaintiff in support of his motion. There is no argument that Plaintiff should be allowed to proceed by pseudonym based on a challenge to governmental activity or because he will be required to admit an intention to engage in illegal conduct. Likewise, even if the Court were to consider the three factors cited by Plaintiff—(1) risk of retaliatory physical or mental harm, (2) preserve privacy in a matter of sensitive and highly personal nature, and (3) prosecuting the lawsuit would compel him to admit an intention to engage in criminal activity—only the second factor is asserted by Plaintiff and is relevant to the Court's determination.

Sept.19, 2013), *reconsideration denied,* Civ. A. 12–515, 2014 WL 3535073 (E.D. Pa. July 17 2014); *Dempsey v. Bucknell Univ.,* Civ. A. 4:11–cv–01 679, 2012 WL 1569826 (M.D. Pa. May 3, 2012); *Gomes v. Univ. of Me. Sys.,* 365 F.Supp.2d 6 (D. Me. 2005); *Fellheimer v. Middlebury Coll.,* 869 F. Supp. 238 (D. Vt. 1994); *Ruane v. Shippensburg Univ.,*871 A.2d 859 (Pa. Commw. Ct. 2005)). The court denied the student's motion. *Id.* at *3. The *Temple University* facts bear a striking resemblance to the facts presently before the Court. Plaintiff offers no concrete basis to justify proceeding pseudonymously.[3]

Moreover, the "utmost intimacy" factor was the only factor present in *Luckett*, which was decided before Judge James Rosenbaum. *See Luckett*, 21 F. Supp. 2d at 1030. Despite the presence of this sole factor, the Court held that matters relating to sexual coercion and sex discrimination are "undoubtedly uncomfortable" but "relatively frequent." *Id.* Based on that finding, and on other similar facts, the Court held that the plaintiff's "privacy is outweighed by the public's stronger interest in maintaining open trials." *Id.* Allegations of sexual misconduct, which constitute sex discrimination under

[3] Multiple courts have determined that a student is not entitled to proceed by pseudonym when challenging a university's finding of sexual misconduct. *See Doe v. Wesleyan Univ.*, Civ. No. 3:14-cv-1735-SRU (D. Conn. Aug. 20, 2015) (ECF No. 30) ("*Wesleyan Order*"), 2d Supp. Schooler Aff. Ex. G; *Doe v. Wesleyan Univ.*, Civ. No. 3:14-cv-1735-SRU (D. Conn. Nov. 23, 2015) (ECF No. 37) ("*Wesleyan Reconsideration Order*"), 2d Supp. Schooler Aff. Ex. H; *Doe v. Temple University*, Civ. No. 14-04729, 2014 WL 4375613, at *1 (E.D. Pa. Sept. 3, 2014); *F.B. v. East Stroudsburg Univ.*, No. 3:09CV525, 2009 WL 2003363, at *4 (M.D. Pa. July 7, 2009) (granting motion for more definite statement and requiring plaintiff to refile amended complaint without pseudonyms). Some courts have permitted pseudonymous filings by plaintiffs in such cases. *See, e.g., Doe v. Columbia University*, 101 F. Supp. 3d 356, 360 (S.D.N.Y. 2015) (allowing plaintiff to proceed by pseudonym in light of university's consent).

Title IX, are undoubtedly sensitive but they are also relatively common. The public is entitled to know who is using the federal courts and that interest outweighs the degree of discomfort faced by Plaintiff in being named publicly as a party to the lawsuit he filed.

Doe v. Bruner is also instructive. In *Bruner*, a sexual assault victim sued his assailant. *Bruner*, CA2011-07-013, 2012 WL 626202, at *1 (Ohio Ct. App. Feb. 27, 2012). In *Bruner*, the trial court denied the plaintiff's motion to proceed pseudonymously. *Id.* The *Bruner* court noted that the "utmost intimacy" factor was the only applicable factor and decided that, "even though the sexual abuse charges likely included information of the 'utmost privacy,' this single factor was not so persuasive that it substantially outweighed the presumption of open judicial proceedings." *Id.* at *3. Unlike the plaintiff in *Bruner*, Plaintiff's Complaint does not assert claims for sexual abuse. Rather, he asserts claims for discrimination, breach of contract and negligence. These are common claims and do not compel Plaintiff to disclose sufficient details of the "utmost intimacy" to overcome the presumption in favor of open trials.

Plaintiff has not presented this Court with any unique or significant arguments that meet the high burden required to proceed pseudonymously. As a result, Plaintiff's motion should be denied.

C. Plaintiff's Actions Justify the Denial of Plaintiff's Motion

Because the three factors governing anonymous litigation identified in *Luckett* are "non-exhaustive," the Court can consider other circumstances bearing on Plaintiff's motion. *See Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) (considering the totality of circumstances). Here, the Court should also consider the following: (1) plaintiffs should not be allowed to use pseudonymous status as a litigation strategy to expose sensitive information about others while remaining anonymous; and (2) Plaintiff waived pseudonymous status by disclosing his own name and other identifying information, and the non-party victim's name and other identifying information, in his previous filings.

First, the Court should protect against the use of anonymous litigation as a sword and a shield. Plaintiff purposefully identified and exposed highly sensitive information about his alleged victim in the Verified Complaint, including her name, address, birthdate, medical information, and intimate details about a sexual encounter between them, but at the same time seeks anonymity. Allowing Plaintiff to proceed anonymously, although he already identified his alleged victim and the details of their encounter, has the potential to chill future reports of alleged sexual misconduct. The Court should not validate Plaintiff's litigation strategy of publicly exposing a non-party victim while seeking to avoid the "embarrassment" and "harm" that he claims his own allegations will cause.

In addition, Plaintiff's complaint makes numerous, highly charged allegations against the University. The Complaint identifies various University personnel by name, and, as a result of media coverage on this case, one University administrator has received an explicit threat. In *Wesleyan*, the Court denied permission for the plaintiff to file under a pseudonym under similar circumstances. As in this case, the plaintiff in *Wesleyan* sought to proceed using a fictitious name after being disciplined by his university for alleged sexual misconduct. *Wesleyan Order*, at 1. In support of his request for anonymity, the plaintiff cited harm to his reputation, future career and educational prospects, and emotional and mental health. *Id.*

The *Wesleyan* court found that the allegations were not "so sensitive that they justify permitting him to prosecute his case against the University without disclosing his identity." *Wesleyan Order*, at 2-3. The *Wesleyan* court further recognized the inherent unfairness that would result if the plaintiff was allowed to proceed anonymously: "Wesleyan is required to defend itself publicly, and the plaintiff has not established that the circumstances warrant affording him alone the advantage of anonymity." *Id.* at 3. Similarly, in this case, Plaintiff has not demonstrated that circumstances warrant affording him the advantage of remaining anonymous while the University publicly defends its policy and decision.

Second, Plaintiff has filed pleadings and exhibits publicly in which his name is improperly redacted, and in which his student identification number is not redacted. (*See, e.g.*, Compl. Ex. 8, at 1 (improperly redacted name); Ex. 9, at 1 (same); Ex. 11, at 1 (exposed student identification number).) Under Rule 5.2(h) of the Federal Rules of Civil Procedure governing the filing of confidential information, which is instructive in this factual situation, "A person waives the protections of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal." Fed. R. Civ. P. 5.2(h). Because Plaintiff has already exposed his name and information, his motion should be denied.

D. Entry of a Protective Order Would Address Plaintiff's Concerns

Plaintiff's concerns regarding confidentiality of sensitive information are better addressed through a protective order than an anonymous pleading. Rule 26(c)(1) provides that a court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). The Court is vested with "broad discretion in determining whether a protective order is warranted and the appropriate degree of protection." *Medtronic, Inc. v. Guidant Corp.*, No. Civ. 00-1473 (MJD/JGL), 2001 WL 34784493, at *1 (D. Minn. Dec. 20, 2001) (quoting *May Coating Techs., Inc. v. Ill. Tool Works*, 157 F.R.D. 55, 57 (D. Minn. 1994)). It is common for courts to protect information from public disclosure where it concerns medical, education, or other inherently private information. *See, e.g.*, *Flaherty v. Seroussi*, 209 F.R.D. 300, 304 (N.D.N.Y. 2002) (protecting information from public disclosure where it concerned sensitive, private information). Courts all over the country employ protective orders as a matter of course. *See* 8A Fed. Prac. & Proc. Civ. § 2035 (3d ed.) ("Many courts have employed [umbrella orders]. As the Seventh Circuit noted in 2010, "protective orders are often entered by stipulation when discovery commences." (footnotes omitted)).

The entry of an umbrella protective order in this case will be critical to the discovery process. The privacy concerns of both parties will be served by entry of an order that protects specific, detailed information disclosed in discovery from public dissemination. The University submits that Plaintiff's concerns are more aptly addressed by the entry of a protective order allowing the parties to designate certain information as "confidential." Following the Court's decision on the motions currently pending before it, the parties should confer in good faith to reach an agreement on the terms of such an order.[4]

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[4] On May 11, 2016, Plaintiff filed a letter stating that if his motion to proceed by pseudonym is granted, he would like an order allowing Jane Doe and other students to proceed anonymously too. *See* McGraw Letter to Mag. J. Menendez, dated May 11, 2016 (ECF No. 27). Jane Doe's identity, and the identities of other students who may be referenced in this litigation, should be kept confidential throughout the pendency of this litigation, regardless of the outcome of this motion. Providing the names of a sexual assault victim in litigation "serve[s] no useful public or investigative purpose." *Alexander v. City of Greensboro*, No. 1:09-CV-00293, 2013 WL 6687248, at *5 (M.D.N.C. Dec. 18, 2013) (quoting *Wilmink v. Kanawha Cnty. Bd. of* Educ., Civ. A. No. 2:03–0179, 2006 WL 456021, at *3 (S.D.W.Va. Feb. 23, 2006)); *see also Doe 2 v. Kolko*, 242 F.R.D. 193, 195 (E.D.N.Y. 2006) (collecting cases; acknowledging the that "sexual assault victims are a paradigmatic example of those entitled to a grant of anonymity"). Further, Jane Doe is not a party to this litigation. She has not enlisted the Court's assistance in vindicating her rights or pursuing any relief. Disclosure of her identity in this litigation is inappropriate and should be prohibited.

CONCLUSION

Plaintiff has not met the high burden to proceed in this case pseudonymously. His request to proceed as a "John Doe" litigant should be denied.

Dated: May 13, 2016

BRIGGS AND MORGAN, P.A.

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